BEFORE THE GROWTH MANAGEMENT HEARINGS BOARD
CENTRAL PUGET SOUND REGION
STATE OF WASHINGTON

DAVIDSON SERLES & ASSOCIATES and TR CONTINENTAL PLAZA CORP, Petitioners, v. CITY OF KIRKLAND, Respondent, TOUCHSTONE CORPORATION and TOUCHSTONE KPP DEVELOPMENT, LLC, Additional respondents.	**CASE NO. 09-3-0007C** ***(Davidson Serles I)*** **FINDING OF COMPLIANCE** **Coordinated with** **CASE NO. 10-3-0012** ***(Davidson Serles II)*** **FINAL DECISION AND ORDER**

SYNOPSIS

Petitioners brought a series of challenges to the City of Kirkland's ordinances in support of a major downtown commercial project. In this coordinated order, the Board concludes the City's environmental review meets the requirements of SEPA for consideration of reasonable alternatives to the proposal. The EIS includes off-site alternatives and alternatives having lesser impacts in some areas and greater impacts in others. The Board finds the EIS compliant with the SEPA mandate for analysis of reasonable alternatives with less environmental impact, as it presents sufficient information for a reasoned decision among alternatives having differing impacts.

The Board also concludes the City's revisions to its Capital Facilities Plan and Transportation Element (a) provide consistency between the project proposal and the corresponding elements of the comprehensive plan and (b) meet the criteria for a transportation financing plan set forth in RCW 36.70A.070(6)(a)(iv). The Board enters a

Growth Management Hearings Board
319 7th Ave. SE, Suite 103
P.O. Box 40953
Olympia, Washington 98504-0953
Phone: 360-586-0260
Fax: 360-664-8975

finding of compliance in Davidson Serles I, Case No. 09-3-0007c, and dismisses Davidson Serles II, Case No. 10-3-0012.

I. BACKGROUND

In *Davidson Serles, et al. v. City of Kirkland,* CPSGMHB Case No. 09-3-0007c (*Davidson Serles I*), Davidson Serles and TR Continental Plaza challenged the City of Kirkland's adoption of Ordinance Nos. 4170 and 4171. These ordinances amended the City's Comprehensive Plan and development regulations to allow redevelopment of Parkplace, a large downtown property. Touchstone Corporation, the owner of Parkplace, intervened in the proceedings. The petitioners are owners of two adjoining pieces of property in downtown Kirkland.

On October 5, 2009, the Board issued its Final Decision and Order in *Davidson Serles I*. The Board found that the City's action failed to consider reasonable alternatives, including off-site alternatives, as required under SEPA and failed to comply with GMA provisions for consistency with the capital facilities element and the transportation element of the City's Comprehensive Plan. The Board did not issue a determination of invalidity.

The City of Kirkland then undertook additional SEPA analysis and revised its Capital Facilities Plan (CFP) and transportation plan, enacting Ordinance Nos. 4257 and 4258. Ordinance 4257, based on the supplemental SEPA analysis, readopted the Parkplace plan that was approved in Ordinance Nos. 4170 and 4171. Ordinance 4258 amended the City's CFP and transportation plan to include the transportation projects necessitated by the Parkplace redevelopment. Petitioners filed objections to a finding of compliance. Petitioners also filed a new petition for review challenging elements of Ordinance Nos. 4257 and 4258 - *Davidson Serles, et al. v. City of Kirkland and Touchstone Corporation,* GMHB Case No. 10-3-0012 (*Davidson Serles II*).

The Compliance Hearing for *Davidson Serles I* and the Prehearing Conference in *Davidson Serles II* were held on November 2, 2010. Because the new petition involved the same

Growth Management Hearings Board
319 7th Ave. SE, Suite 103
P.O. Box 40953
Olympia, Washington 98504-0953
Phone: 360-586-0260
Fax: 360-664-8975

parties and raised issues substantially overlapping the matters subject to the compliance in the earlier case, the Board coordinated the cases. The parties agreed to an expedited schedule for hearing *Davidson Serles II* on the merits and stipulated to extending the time for the Board's ruling on compliance in *Davidson Serles I.* The Hearing on the Merits was held on December 21, 2010.

This Order provides first, a finding of compliance in *Davidson Serles I*, and second, a final decision and order in *Davidson Serles II*.

II. PRESUMPTION OF VALIDITY AND BURDEN OF PROOF

The GMA provides cities with broad discretion to develop comprehensive plans.[1] A city's discretion, however, "is bounded … by the goals and requirements of the GMA."[2] The GMA's goals include encouraging urban growth in urban areas, encouraging economic development, protecting the environment, and providing facilities and services necessary to support development.[3]

The Board adjudicates GMA compliance and may invalidate noncompliant comprehensive plans and development regulations.[4] The Board may also find that a city is not in compliance with the GMA's requirements and remand to enable the city to comply with the GMA's requirements.[5]

A city's comprehensive plan or amendment thereto is presumed valid upon adoption.[6] Consequently, the Board must find that a city complied with the GMA unless the party challenging the city's action demonstrates that the action is "clearly erroneous in view of the

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[1] *King County v. Central Puget Sound Growth Management Hearings Board*, 142 Wn.2d 543, 561, 14 P.3d 133 (2000).
[2] *King County*, 142 Wn.2d at 561.
[3] RCW 36.70A.020(1), (5), (10), (11), (12).
[4] *Lewis County v. Western Washington Growth Management Hearings Board*, 157 Wn.2d 488, 497, 139 P.3d 1096 (2000); RCW 36.70A.280, .302.
[5] RCW 36.70A.300(3)(b).
[6] RCW 36.70A.320(1).

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319 7th Ave. SE, Suite 103
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Olympia, Washington 98504-0953
Phone: 360-586-0260
Fax: 360-664-8975

entire record before the board and in light of the [GMA's] goals and requirements."[7] A city's action is "clearly erroneous" if the Board has a firm and definite conviction that the city made a mistake.[8]

A city's action taken in response to an order of non-compliance is equally presumed valid upon adoption. The burden is again on the petitioner to demonstrate that the action is not in compliance with the requirements of the GMA or the Board's order.[9]

III. FINDING OF COMPLIANCE
Davidson-Serles I – Case 09-3-0007c

A. Procedural Background

On October 5, 2009, the Board issued its Final Decision and Order (**FDO**) in *Davidson Serles I*. The Board ruled that the City's adoption of Ordinance Nos. 4170 and 4171 complied with the Growth Management Act with respect to several of Petitioners' allegations but found noncompliance in three instances and remanded the ordinances to the City to correct those areas of non-compliance. The FDO provided:[10]

> ….
>
> 3. The City of Kirkland's adoption of Ordinance Nos. 4170 and 4171 was **clearly erroneous** in two respects:
>   - The City did not comply with RCW 36.70A.070(preamble), .070(3)(b, c) and .070(6)(a)(iv) as set forth under Legal Issues 1 and 2.
>   - The City's SEPA review is deficient as set forth in Legal Issue 4B.
> 4. Therefore the Board **remands** Ordinance Nos. 4170 and 4171 to the City of Kirkland with direction to the City to take legislative action to comply with the requirements of the GMA and SEPA as set forth in this Order.[11]

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[7] *Lewis County*, 157 Wn.2d at 497 (quoting RCW 36.70A.320(3)); see also RCW 36.70A.320(2) (stating that a challenger has burden to demonstrate that a city's action is not GMA-compliant).

[8] *Thurston County v Western Washington Growth Management Hearings Board,* 164 Wn.2d 329, 340-41, 190 P.3d 38 (2008).

[9] RCW 36.70A.320(1) and (2). When the Board has made a determination of invalidity, the burden shifts to the City or County to demonstrate that its action no longer interferes with GMA goals (RCW 36.70A.320(4)); however, there was no determination of invalidity in this case.

[10] FDO, at 21.

[11] The FDO established April 5, 2010, as the deadline for the City to take appropriate legislative action, but the deadline was subsequently extended to October 5, to accommodate the proposed schedule of the SEPA

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319 7th Ave. SE, Suite 103
P.O. Box 40953
Olympia, Washington 98504-0953
Phone: 360-586-0260
Fax: 360-664-8975

On October 18, 2010, the Board received the City of Kirkland's Statement of Actions Taken to Comply (**SATC**), attaching Ordinance Nos. 4257[12] and 4258.[13] The City also provided its Compliance Index, documenting the public process undertaken in connection with these enactments.

The Board received Petitioners' Objections to Finding of Compliance on October 25 and the City's Reply to Petitioners' Objections to Finding of Compliance on October 29. No briefing was filed by Intervenor Touchstone.

The Compliance Hearing was held telephonically on November 2, 2010. Present for the Board were Presiding Officer Margaret Pageler and panelists Dave Earling and James McNamara. Petitioners were represented by Jeffrey Eustis for Davidson Serles and David Mann for TR Continental Plaza. The City of Kirkland was represented by its attorney Robin Jenkinson. Intervenor Touchstone Corporation appeared by its attorney Rich Hill. Leslie Kay of Capitol Pacific Reporting Inc. provided court reporting services.

B. Compliance with SEPA

The Remanded Issue

In the FDO the Board ruled that the City of Kirkland's adoption of Ordinance 4170 and 4171 failed to comply with the requirements of SEPA, as follows:

> The Board finds that Kirkland's FEIS for Ordinance 4170 and 4171 is insufficient for failure to assess reasonable alternatives to the Touchstone proposal, *including offsite alternatives* to the nonproject action. The Board **remands**

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consultant, subject to required interim status reports. Status reports were provided March 10, August 5 and August 16, 2010.

[12] "An Ordinance of the City of Kirkland related to land use and planning; and reaffirming the City's adoption of the Comprehensive Plan and zoning code amendments made in Ordinances 4170 and 4171 after consideration of the Planned Action Supplemental Environmental Impact Statement issued on August 16, 2010 in connection with City File No. ZO207-00016."

[13] "An Ordinance of the City of Kirkland related to comprehensive planning and land use and amending the Comprehensive Plan, Ordinance 3481 as amended, to implement changes to the Introduction, Land Use, Capital Facilities and Transportation elements, and approving a summary for publication, File No. ZO207-00016."

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319 7th Ave. SE, Suite 103
P.O. Box 40953
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Fax: 360-664-8975

Ordinances 4170 and 4171 to the City of Kirkland to take the action necessary to fully comply with SEPA.[14]

The City's Compliance Action- Off-Site Alternatives

In order to evaluate at least one off-site alternative to the Touchstone proposal, the City first undertook a "Commercial Growth Alternatives Site Selection Study."[15] The study identified alternative locations for some or all of the downtown commercial growth proposed in the Touchstone project. As a result of that study, three additional alternatives were identified for further analysis:

- Superblock Alternative encompasses the whole of the block on which Parkplace is located, including Petitioners' properties;
- Unified Ownership Alternative divides the commercial growth between Parkplace and the Post Office site on the perimeter of downtown; and
- Off-Site Alternative expands the CBD and disburses the commercial growth more generally in the downtown area.

The revised DSEIS analyzed these alternatives together with the alternatives reviewed in the 2008 EIS:

- No Action Alternative,
- Proposed Action (Touchstone's proposal for Parkplace), and
- FEIS Review Alternative (a modification of the Proposed Action proposed by the Planning Commission).

The FSEIS provided a further break-out of information on the three new alternatives, indicating the "Parkplace Only" impacts for the Superblock, Unified Ownership and Offsite Alternatives.

The City points out that each of the new alternatives distributes some additional commercial development to other locations, providing the City with information necessary to evaluate off-site alternatives to development at Parkplace at the scale proposed by Touchstone.

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[14] FDO, at 16 (emphasis supplied).
[15] DSEIS, Ex. A (May, 2010).

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319 7th Ave. SE, Suite 103
P.O. Box 40953
Olympia, Washington 98504-0953
Phone: 360-586-0260
Fax: 360-664-8975

Board Discussion and Analysis

The City's 2008 SEPA analysis considered only the Touchstone proposal, the modified FEIS Review Alternative, and the no-action alternative. "[N]o offsite alternatives were reviewed, and no intermediate schemes were assessed."[16] The Board's FDO relied on the Court's holding in *Citizens' Alliance to Protect Wetlands v. City of Auburn*[17] to determine that the environmental review for a non-project action must consider off-site alternatives in addition to the proposal and the no-action alternative. The Board, in a footnote, suggested the superblock alternative,[18] but the ruling was clear: "[T]he Board does not dictate the specific alternatives to be reviewed."[19]

On remand, the City chose as its stated objective the development of an additional 954,000 square feet of office and retail development in or near the downtown. The 954,000 square footage was based on the additional development proposed for the Parkplace site in the Touchstone proposal. The three new alternatives would each distribute some future growth to other downtown locations. The Superblock and Unified Ownership alternatives each assume a lesser increase of development on the Parkplace site (+482,000 square feet) and the Off-Site Alternative involves no increase on the Parkplace site above that allowed under the No Action Alternative.

Additionally, for the Superblock, Unified Ownership and Offsite Alternatives the FSEIS segregated out the Parkplace portion of the alternative to examine the impacts of development on that portion of the project alone. For example, for the Superblock Alternative, the "Parkplace alone" analysis revealed that development on the Parkplace site would be at a scale similar to the No Action Alternative at 4-5 stories, reducing bulk next to the park. Alternatives that moved some of the proposed downtown growth "off-site" reduced environmental impacts of the Parkplace development alone. While each of the major

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[16] FDO, at 17-18.
[17] 126 Wn. 2d 356, 894 P.2d 1300 (1995).
[18] FDO, at 18, fn. 20.
[19] FDO, at 18.

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319 7th Ave. SE, Suite 103
P.O. Box 40953
Olympia, Washington 98504-0953
Phone: 360-586-0260
Fax: 360-664-8975

alternatives studied contained approximately 954,000 additional square feet, the information was presented in a manner that decision makers could select an alternative that would meet the project's objectives at a lower environmental cost, thus satisfying WAC 197-11-786.

The Petitioners object to the City's 2010 SEPA review because alternatives were selected to accommodate a pre-determined square footage, rather than to meet the identified public goals. The Petitioners contend the SEPA requirement to assess alternatives that might meet the project's objectives at less environmental cost cannot be satisfied if the "objective" is to build all that the developer has proposed. Petitioners again assert: "SEPA requires environmental review to describe a non-project action in terms of its objectives, rather than a preferred course of action." To support this assertion, Petitioners cite WAC 197-11-060(3)(a)(iii).

In the FDO the Board considered whether the City's 2008 SEPA review was required to identify *public* objectives for the non-project action rather than merely the project-specific objectives of Touchstone. The Board ruled as follows:

> However, Petitioners have cited no authority on this issue other than the SEPA guidelines. As the Board reads the relevant SEPA provisions, they are *permissive*, not mandatory. WAC 197-11-060(3) provides:
>
> > (ii) A proposal by a lead agency or applicant **may** be put forward as an objective, as several alternative means of accomplishing a goal, or as a particular or preferred course of action.
> > (iii) Proposals **should** be described in ways that encourage considering and comparing alternatives. Agencies **are encouraged to** describe public and nonproject proposals in terms of objectives rather than preferred solutions.
>
> In the SEPA definitions, "'may' is optional and permissive and does not impose a requirement." WAC 197-11-700(3)(b).[20]

The Board concluded:

[20] FDO, at 16.

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> Petitioners' argument is appealing, but they have not identified a legal requirement that the City's EIS be based on a statement of public objectives.

The Board notes that the 2010 DSEIS identifies public objectives for the proposed increased commercial and retail development downtown: increased employment capacity, destination retail, public open space and amenities, pedestrian connections, neighborhood compatibility, and transit-oriented development. [21] However, these themes do not appear to have provided a framework for differentiation among the alternatives, and SEPA does not require the EIS to be based on them.

Having reviewed the alternatives analyzed in the 2010 FSEIS, the Board finds the City has satisfied the SEPA requirement to review reasonable alternatives, including off-site alternatives. As the Board discusses further in the final order on *Davidson Serles II* which follows, the parties have not cited, and the Board has not found, any authority requiring an alternative that is smaller or intermediate in size, only that alternatives have lower environmental cost. In the proper case, this requirement may be met by off-site alternatives that spread the proposed development across a larger footprint.[22]

In *Weyerhaeuser v Pierce County,*[23] the Court states:

> The required discussion of alternatives to a proposed project is of major importance, because it provides for a reasoned decision among alternatives having differing environmental impacts.

Here the 2010 FSEIS demonstrates that distributing some or all of the proposed square footage off-site would reduce the bulk and scale of development, particularly on the Parkplace site, lessening shadows and enhancing view corridors. Parking management might be eased, and traffic impacts would be disbursed to different intersections. The Board is persuaded that the 2010 FSEIS off-site alternatives provided the City Council with

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[21] DSEIS at 2-5.
[22] See, e.g., *Brinnon Group, et al v. Jefferson County,* Court of Appeals No. 93071-0-II (Jan. 19, 2011).
[23] 124 Wn.2d 26, 42, 873 P.2d 498 (1994), cited in Petitioners' Objections, at 4.

Growth Management Hearings Board
319 7th Ave. SE, Suite 103
P.O. Box 40953
Olympia, Washington 98504-0953
Phone: 360-586-0260
Fax: 360-664-8975

"sufficient information to make a reasoned decision," [24] particularly as the break-out of information for the Parkplace site allowed the Council to evaluate development at greatly reduced scale.

Conclusion[25]

The Board finds the City's 2010 FSEIS identifies and analyzes reasonable alternatives, including off-site alternatives, and therefore cures the deficiency identified in the FDO. The Board concludes the City's 2010 FSEIS **complies** with SEPA as articulated in the Board's FDO.

C. Consistency with Capital Facilities and Transportation Plans

The Remanded Issues

In the FDO, the Board ruled that the City of Kirkland's adoption of Ordinance 4170 and 4171 failed to comply with the consistency requirement of RCW 36.70A.070 (preamble). The Board found that the City had identified a suite of transportation improvements that were required to mitigate the impacts of the Touchstone proposal, but that these improvements were not included or financed in the City's plans as required by RCW 36.70A.070(6). The FDO stated:

> In sum, the Board finds and concludes that Ordinances 4170 and 4171 **fail to meet the consistency requirement** of RCW 36.70A.070 (preamble), .070(3), and .070(6) because of failure to amend the capital facilities plan to include all necessary capital improvements and because of the lack of a "multi-year financing plan based on the [10-year transportation] needs identified in the comprehensive plan." [26]

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[24] *Citizens' Alliance*, 126 Wn.2d at 362.

[25] The Petitioners have additional objections to the 2010 FSEIS which they articulated in a new Petition for Review – Case No. 10-3-0012. While the Board believes all questions of SEPA compliance might have been appropriately raised and resolved in the compliance proceedings for Case No. 09-3-0007c, the filing of a new PFR allowed for more thorough review and analysis. Those issues are addressed in the Final Decision and Order which follows.

[26] FDO at 9.

Growth Management Hearings Board
319 7th Ave. SE, Suite 103
P.O. Box 40953
Olympia, Washington 98504-0953
Phone: 360-586-0260
Fax: 360-664-8975

The City's Compliance Action

On remand, the City enacted Ordinance 4258, amending the Capital Facilities Plan and the Transportation Element of its Comprehensive Plan to include all the improvements called for in the Planned Action Ordinance for the Touchstone project for a ten-year period.[27] The source of funds identified for improvements listed as "Parkplace Redevelopment-Related Project" is "Developer funded (including Impact Fees)." [28]

Board Discussion and Analysis

In the FDO the Board found the City had identified 18 transportation projects necessary to mitigate Parkplace development impacts but, because a number of the projects would not be needed within the 6-year CFP and Transportation Improvement Program (TIP) timelines, the City had not included them in the capital facilities and transportation elements of the comprehensive plan. On remand, with Ordinance 4258 the City has amended its CFP and Transportation Element to include all the projects and has identified the funding source as "developer funded."

Petitioners no longer dispute that the Parkplace mitigations are listed in the City's plan. Rather, they argue the GMA requires "an analysis of funding capability" for transportation improvements, which the City's identification of sources fails to provide, and "a discussion … of how land use assumptions will be reassessed" if funding falls short.[29] Petitioners point out that revenues from a number of the funding sources are highly volatile, including from gasoline, sales and real estate excise taxes, which depend on economic circumstances lying beyond the City's control. Petitioners argue the financing plan should "address such things as the capability of the sources to provide the projected revenues, the range of revenues reasonably expected, the assumptions and variables for the projected sums, and

[27] Ordinance 4258, Table CF-8A.
[28] Ordinance 4258, Table 6F-8.
[29] RCW 36.70A.070(6)(a)(iv)

Growth Management Hearings Board
319 7th Ave. SE, Suite 103
P.O. Box 40953
Olympia, Washington 98504-0953
Phone: 360-586-0260
Fax: 360-664-8975

the level of certainty for the projections."[30] Petitioners provide no case citations or other authority for their argument.

The Board notes that the Final Decision and Order focused on the GMA requirement for consistent capital facilities and transportation planning to support the City's comprehensive plan amendments related to Parkplace. The Board finds that the City has included all the identified Parkplace-related transportation projects and has indicated developer-funding as the necessary revenue source. The volatility of tax revenues is irrelevant to the question of GMA compliance addressed in the FDO.[31] Petitioners' objection is without merit.

As to reassessment of land use, Petitioners urge that the project mitigations are necessary for a specific development; therefore "an analysis should address whether the City could lawfully change the scale and timing of the Touchstone proposal or the level of payment of impact fees" to address funding shortfalls.[32]

The Board notes Petitioners are rearguing a question previously decided in the FDO:

> Second, the Petitioners argue that the City's plans lack a provision for re-assessing land use if funding for needed improvements falls short. The Board finds that there is a provision for land use reassessment in Kirkland's 2004 Comprehensive Plan, Capital Facilities Element, at XIII-10, Policy CF-5.2, which satisfies this GMA requirement.[33] …
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> [T]he Board concludes that Petitioners **have not carried their burden** of demonstrating failure to provide for reassessment of the land use element if funding falls short.[34]

The Board declines to reconsider its FDO in this compliance proceeding.[35] The City would do well to ensure that the development agreement for the Parkplace project allows

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[30] Petitioners' Objections to Compliance, at 8.These arguments are addressed more fully below.
[31] The Petitioners have asserted this issue in their new Petition for Review – Case No. 10-3-0012. The Board addresses the question in the Final Decision and Order which follows, noting that the Compliance Order resolves the matter with respect to the Parkplace issues.
[32] Petitioners' Objection, at 9.
[33] FDO, at 10.
[34] FDO at 11

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319 7th Ave. SE, Suite 103
P.O. Box 40953
Olympia, Washington 98504-0953
Phone: 360-586-0260
Fax: 360-664-8975

modification of the scale of development if Touchstone is unable to fund the necessary transportation improvements, but there is no basis for a finding of noncompliance with the GMA.

Conclusion[36]

The Board finds the City's adoption of Ordinance 4258 amended the Capital Facilities Plan and the Transportation Element of the City's Comprehensive Plan to include and identify funding sources for all the improvements called for in the Planned Action Ordinance for the Touchstone project for a ten-year period, thereby curing the deficiencies identified in the FDO. The Board finds and concludes the City's enactment of Ordinance 4258 meets the consistency requirements of RCW 36.70A.070 (preamble), .070(3), and .070(6) because it includes all necessary capital improvements and provides a "multi-year financing plan based on the [10-year transportation] needs identified in the comprehensive plan." As to Ordinance 4258, the Board concludes the City **complies** with the GMA as set forth in the Board's FDO.

D. Finding of Compliance

Based upon review of the October 5, 2009, Final Decision and Order, the City of Kirkland's Statement of Actions Taken to Comply, the responses of various parties, the Board's review of Ordinance Nos. 4257 and 4258 and the 2010 FSEIS, the arguments and comments offered in the briefing and at the compliance hearing, and having deliberated on the matter, the Board finds:

- By adopting Ordinance Nos. 4257 and 4258, the City of Kirkland has complied with the goals and requirements of the GMA as set forth in the Board's FDO. The Board

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[35] See WAC 242-02-832: Motion for reconsideration to be filed within 10 days of issuance of FDO.

[36] The Petitioners have additional and overlapping objections to Ordinance 4258 which they have articulated in Case No. 10-3-0012. While the Board believes all questions of compliance with RCW 36.70A.070(6)(a)(iv) might have been appropriately raised and resolved in the compliance proceedings for Case No. 09-3-0007c, the filing of a new PFR allowed for more thorough review and analysis. Those issues are addressed in the Final Decision and Order which follows.

Growth Management Hearings Board
319 7th Ave. SE, Suite 103
P.O. Box 40953
Olympia, Washington 98504-0953
Phone: 360-586-0260
Fax: 360-664-8975

therefore enters a **finding of compliance** for the City of Kirkland Re: Ordinance Nos. 4257 and 4258.

IV. FINAL DECISION AND ORDER
Davidson-Serles II – Case No. 10-3-0012

A. Procedural Background

On October 18, 2010, Petitioners Davidson Serles and TR Continental Plaza filed a petition for review challenging City of Kirkland Ordinance No. 4257, which reaffirms the ordinances challenged in the prior case. Within the statutory appeal period, Petitioners amended their petition to include appeal of Ordinance 4258, which amends the City's capital facilities and transportation plans. The prehearing conference for *Davidson Serles II*, Case No. 10-3-0012, was held immediately following the compliance hearing in *Davidson Serles I.* Acknowledging the overlap of issues in the compliance proceeding and the new PFR, the parties agreed to an expedited hearing on the new issues and a delay in issuing the compliance order to ensure consistency and coordination of the Board's ruling.

The Hearing on the Merits was convened on December 21, 2010 in Kirkland City Hall. Present for the Board were Presiding Officer Margaret Pageler and panelists Dave Earling and James McNamara, along with Board staff attorney Julie Taylor. Petitioners were represented by Jeffrey Eustis for Davidson Serles and David Mann for TR Continental Plaza. The City of Kirkland was represented by its attorney Robin Jenkinson, with several city planners, consultants, and Mayor Joan McBride also in attendance. Touchstone appeared by its attorney Rich Hill, with A.P. Hurd of Touchstone Corporation also in attendance. Barbara Hayden of Byers and Anderson, Inc. provided court reporting services.

B. Legal Issue No. 1 - SEPA

The Prehearing Order sets forth Legal Issue No. 1 as follows:

1. *Was Ordinance 4257 adopted through non-compliance with the State Environmental Policy Act (SEPA) where the Supplemental EIS prepared in support of that Ordinance and the reaffirmation of Ordinances 4170 and 4171 fails to fully meet the*

Growth Management Hearings Board
319 7th Ave. SE, Suite 103
P.O. Box 40953
Olympia, Washington 98504-0953
Phone: 360-586-0260
Fax: 360-664-8975

requirements of chapter 43.21C RCW including the failure to accurately and fully identify, consider and evaluate: changes in development allowed by the proposal; a full range of alternatives to the proposed action, including alternatives that could accomplish the proposal's objectives at less environmental impact; and comments on the supplemental EIS?

Davidson Serles challenges Ordinance No. 4257, in which the City readopted the Touchstone proposal for Parkplace, alleging non-compliance with SEPA. The Board addresses, first, the sufficiency of the SEPA alternatives, then the project design changes, and finally, the City's response to SEIS comments.

SEPA Alternatives

Petitioners contend the City's SEPA review fails to meet the requirements of the statute by failing "to accurately and fully identify, consider and evaluate … a full range of alternatives to the proposed action, including alternatives that could accomplish the proposal's objectives at less environmental impact."[37] Petitioners attack the City's use of Touchstone's 945,000 square foot proposal as the "objective" to be applied to all alternatives.

In the Board's discussion of compliance, above, the Board described the various alternatives identified and analyzed in the 2010 DSEIS.[38] The Board noted Petitioners' objection to the use of the 945,000 square foot proposal as the basis for alternatives. In their briefing and argument on the merits in this coordinated case, Petitioners raise the same arguments and provide no additional authority for the proposition that SEPA requires a "smaller" or "reduced" alternative to the proposed action.

Subsequent to the Hearing on the Merits in this matter, Division II of the Court of Appeals issued its decision in *Brinnon Group, et al v Jefferson County*, No. 39071-0-II.[39] *Brinnon* involved a Growth Management Hearings Board ruling in a challenge to a master planned

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[37] Legal Issue 1, supra.
[38] The Board incorporates by reference the facts and analysis concerning the SEPA alternatives in its Finding of Compliance above.
[39] Published Decision issued January 19, 2011

Growth Management Hearings Board
319 7th Ave. SE, Suite 103
P.O. Box 40953
Olympia, Washington 98504-0953
Phone: 360-586-0260
Fax: 360-664-8975

resort (MPR). One issue in the challenge was whether the County's SEPA review was flawed because none of the alternatives reviewed in the EIS called for lesser development than the planned resort.[40] The Court stated "the potential for alternatives with less environmental impact was limited by the intensity of the proposed MPR development itself,"[41] reasoning that any reasonable alternative had to allow this intensity of development but attempt to do so at a lower environmental cost.

The alternatives considered in *Brinnon* each occupied a larger footprint (310 acres) than the proposed MPR (256 acres) and disbursed or added development intensity. Nevertheless, the environmental impacts were lessened in some respects (traffic, sewer, reduced risk of salt water intrusion in water sources), and mitigation measures for each alternative were described in detail. The *Brinnon* Court noted: "Our Supreme Court has approved EIS alternatives that "present[ ] greater impacts in some areas and fewer impacts in others."[42]

The *Brinnon* Court summed up:

> Because the final EIS presented the [County Commissioners] with sufficient information for a reasoned decision among alternatives having different environmental impacts, we conclude the County complied with its SEPA obligations under WAC 197-11-440(5)(b).[43]

In the case before us, the Board notes that Table 3-2 of the FSEIS summarizes the elements of the alternatives as a whole, and also, for each alternative, breaks out the amount of growth occurring on the Parkplace site. The FSEIS summarizes the impacts of the alternatives:

> Looking solely at the amount of development occurring on the Parkplace site in the SEIS alternatives, it would be reduced in every case and would reduce impacts at that location [compared to the City's 2008 action] …. All SEIS

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[40] Because of the parallels with issues in the present case, the Board invited and received additional briefing from the parties: Petitioners' Supplemental Memorandum (Jan. 27, 2011) and City and Touchstone Memorandum (Jan 27. 2011).
[41] *Brinnon,* Slip Op at 30.
[42] *Brinnon*, Slip Op at 31, citing *King County v. CPSGMHB*, 138 Wn.2d 161, 185 (1999)
[43] *Brinnon*, Slip Op at 31-32.

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319 7th Ave. SE, Suite 103
P.O. Box 40953
Olympia, Washington 98504-0953
Phone: 360-586-0260
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> alternatives would reduce building height and floor area ratios significantly on the Parkplace site, which would reduce potential land use and aesthetic impacts on that site." [44]

The comparison of transportation impacts shows disbursing 945,000 square feet of additional growth would impact more intersections if the total square footage is built out. The breakout analysis for 'Parkplace only' provides information about the lesser traffic impacts if the City should choose to adopt a 'Parkplace only' plan at a lesser intensity. In short, the City decision-makers had the information they needed to select a less intense alternative on the Parkplace site or even to choose to forego additional development off-site and to plan for development on the Parkplace site alone at one of the lesser intensities.[45] As the City summarized:

> The breakdown of impacts between "whole" alternatives and "Parkplace alone" was to differentiate impacts and to show how the City's non-project decision could fall anywhere within the range of alternatives and is not necessarily limited to one or another specific alternative. The City's decision could have included selecting growth only on the Parkplace site at the reduced levels assumed by the SEIS alternatives which were about half the growth of the FEIS Review Alternative on the Parkplace site.[46]

The Board finds and concludes that the 2010 SEPA review, with its expanded number of alternatives and subset analysis for the Parkplace site only, provided City Council members with ample information for a reasoned decision among alternatives having different and lesser environmental impacts. The Board concludes Petitioners have not carried their burden of showing any violation of WAC 197-11-440(5).

Design Changes

Petitioners contend the 2010 SEPA review was flawed because it failed to acknowledge or assess the impacts of significant changes to the original Touchstone proposal. The

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[44] SEIS at 3-3

[45] See *Concerned Taxpayers v. Department of Transportation*, 90 Wn.App. 225, 951 P.2d 812 (1998) (EIS which analyzed 4 alternative 4-lane highway bypass options provided adequate information for construction of a 2-lane bypass; there was no requirement to analyze the challengers' 2-lane alternative).

[46] City's Prehearing Brief at 9.

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319 7th Ave. SE, Suite 103
P.O. Box 40953
Olympia, Washington 98504-0953
Phone: 360-586-0260
Fax: 360-664-8975

purported changes are represented in the 2010 Design Summary submitted by the project's architects to the Design Review Board in September, 2010. Petitioners state:

> Overall, the designs presented in the 2010 Design Summary depict buildings that are more stark, austere and hard-edged and offer less modulation, fewer step-backs, and reduced pedestrian-oriented environments than as featured in the 2008 Design Guidelines.[47]

Petitioners assert that the differences between the 2008 Design Guidelines and the 2010 Design Summary "amount to new information that bears on the proposal and its impacts."[48] Touchstone's Response included a subsequent design drawing.[49] Petitioner moved to strike the drawing as being simply a promotional illustration from the developer's website.[50]

Touchstone then requested that the Board take official notice of documents from the City's Design Review Board (DRB), consisting of the DRB record of meetings concerning the Parkplace project from January 7, 2008 to December 13, 2010; the Kirkland Parkplace Final Submittal to the DRB (Dec. 13, 2010); and the Design Review Board Decision (Dec. 13, 2010).[51]

As previously noted, the package of Parkplace ordinances adopted by the City of Kirkland in 2008 included Ordinance 4172 which amended the City's Design Review Board regulations to include Kirkland Parkplace Mixed Use Development Master Plan and Design Guidelines.[52] Ordinance 4172 was not appealed to this Board and thus is not a subject of these proceedings.[53] The Board here only reviews the narrow question of whether the 2010 SEPA review was flawed because it failed to describe and analyze significant changes in the design of the proposal. The Board finds the supplemental documents proffered by

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[47] Petitioners' Reply Memorandum, at 12
[48] Petitioners' Reply Memorandum, at 12
[49] Touchstone Response, at 41-42
[50] Petitioners' Reply Memorandum and Motion to Strike, at 2-3.
[51] Touchstone Response to Petitioners' Motion to Strike and Request that the Board Take Official Notice (Dec. 17, 2010). Petitioner's Reply in Support of Motion to Strike was submitted at the Hearing on the Merits.
[52] FDO at 5, fn 6
[53] Design review ordinances are within the Board's jurisdiction. *Davidson Serles v. City of Kirkland*, Court of Appeals No. 64072-1-I (Jan. 24, 2011), Slip op. at 12-14.

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319 7th Ave. SE, Suite 103
P.O. Box 40953
Olympia, Washington 98504-0953
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Fax: 360-664-8975

Touchstone are "necessary or of substantial assistance" in deciding this question, though they were produced subsequent to the challenged action. The Board reasons that a significant amendment or major modification of the adopted design guidelines might arguably constitute new information for purposes of SEPA analysis. These documents are therefore admitted.

Do the Design Review Board documents provide new information? No.

The Design Review Board Decision demonstrates:

- the adopted design guidelines for Parkplace were not changed,
- no "major modification" to the guidelines was proposed, and
- the four "minor modifications" allowed were each ruled to be "consistent with the intent of the guideline and result[ing] in superior design" and "not result[ing] in any substantial detrimental effect on nearby properties or the neighborhood."

On this record the Board cannot find there was a substantial change to the project that should have been noted and analyzed in the environmental review.

Consideration of EIS Comments

Legal Issue 1 asserts the 2010 FSEIS was flawed by "failure to accurately and fully identify, consider and evaluate … comments on the Supplemental EIS." Petitioners point to the comments of their consultants, Robert Thorpe & Associates, criticizing the City's use of 945,000 square feet as the base line for all the SEIS Alternatives.[54]

The Board finds the FSEIS contains a lengthy response to the Thorpe letter.[55] Mr. Thorpe's questioning of the rationale for 945,000 square feet of additional commercial space in Kirkland is certainly understandable; however, there is no merit to the assertion that the City failed to consider the comments.

[54] FSEIS at Letter 21.
[55] FSEIS at 3.2 – 3.7.

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319 7th Ave. SE, Suite 103
P.O. Box 40953
Olympia, Washington 98504-0953
Phone: 360-586-0260
Fax: 360-664-8975

Conclusion – SEPA

For the foregoing reasons the Board finds and concludes that Petitioners **have not carried their burden** in demonstrating the City's adoption of Ordinance 4257 failed to comply with SEPA. Legal Issue 1 is **dismissed.**

C. Legal Issue No. 2 - Transportation Financing Plan

The Prehearing Order sets forth Legal Issue 2 as follows:

> 2. *Was Ordinance 4258 adopted in noncompliance with GMA where the Ordinance on its face, the decision record compiled by the City, and the supplemental EIS fail to provide "an analysis of funding capability to judge needs against probable funding resources" and fail to provide a "discussion of how additional funding will be raised, or how land use assumptions will be reassessed" in the event that funding falls short, as required by RCW 36.70A.070(6)(a)(iv)(A)and C), for plan and zoning designations whose infrastructure improvements and development limits are separately established through a planned action ordinance and design review guidelines and approvals?*

Davidson Serles challenges Ordinance 4258 for failure to comply with the GMA requirements for transportation finance planning. In enacting Ordinance 4258, the City of Kirkland sought to comply with the FDO by incorporating the full list of transportation improvements identified in the Planned Action Ordinance for the Parkplace project. Ordinance 4258 amends the Capital Facilities element by amending Table CF-8 (a listing of 6 year capital improvements) and by adding a new Table CF-8A, to provide a multi-year financing plan for transportation projects, including projects necessary for the Parkplace redevelopment. Petitioners contend that the transportation element remains out of compliance with the GMA because it fails to provide an "analysis of funding capability" or a discussion of how, should funding fall short, "additional funding will be raised, or how land use assumptions will be reassessed."[56]

Transportation Financing Plan

[56] Petitioners' Hearing Memorandum, at 26.

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P.O. Box 40953
Olympia, Washington 98504-0953
Phone: 360-586-0260
Fax: 360-664-8975

RCW 36.70A.070(6)(a)(iv) requires the transportation element of a local comprehensive plan to include a finance section, containing:

A. An analysis of funding capability to judge needs against probably funding resources;
B. A multiyear financing plan based on the needs identified in the comprehensive plan …;
C. If probable funding falls short of meeting identified needs, a discussion of how additional funding will be raised, or how land use assumptions will be reassessed to ensure that level of service standards will be met.

As set forth in the Compliance Order above, the Board has determined that Ordinance 4258 complies with requirement (B) for a "multiyear financing plan" based on the needs identified in the Comprehensive Plan. In their new petition, Petitioners rearticulate or provide a further challenge to compliance with requirements (A) analysis of funding capability and (C) reassessment of land use assumptions.

Analysis of Funding Capability. Petitioners argue that requirement (A) - analysis of funding capability to judge needs against probable funding resources - entails more than simple identification of funding sources and projected dollar amounts for each source. They point to the volatility of tax-based resources such as the Real Estate Excise Tax and argue the City's plan must include an evaluation of its financial strategy in light of the current recession.[57] They argue the "analysis of funding capability" cannot be limited to single revenue or fund numbers without recognition of the wide ranges of potential returns from various revenue sources. They urge that an analysis of funding capability must address "the range of revenue reasonably expected, the assumptions and variables for the projected sums and the level of certainty for the projections."[58]

The Board finds a detailed narrative on Funding and Financial Feasibility in the City's 2004 Comprehensive Plan Capital Facilities Element.[59] The Plan contains a number of policies which provide the City's methodology of analyzing funding capacity, its process for revising

[57] Petitioners' Hearing Memorandum, at 27, REET Revenue Trend Analysis, 2009-2014 CIP.
[58] *Id* at 28.
[59] 2004 Comprehensive Plan XIII-9 – XIII-12.

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319 7th Ave. SE, Suite 103
P.O. Box 40953
Olympia, Washington 98504-0953
Phone: 360-586-0260
Fax: 360-664-8975

the financing plan if anticipated revenue sources are insufficient, and its process for reassessing land use if funding falls short.[60]

The 2004 Comprehensive Plan Transportation Element likewise contains a Finance narrative that addresses the different funding sources, their variability, and the need for regular review and readjustment of the plan.[61] Policy T-7.2 states: "Transportation funding is limited and unpredictable." The Transportation Finance narrative cross-references the capital facilities chapter and the annual reassessment of funding availability and project feasibility.

Petitioners urge that the 2004 provisions are not sufficient, asserting that the Ordinance 4258 amendments to the City's capital facilities and transportation plan necessitate a re-analysis of funding capability in order to comply with RCW 36.70A.070(6)(a)(iv)(A). The Board does not find this argument persuasive.

The Board does not read the statutory provisions to require the level of financial forecasting proposed by Petitioners. The Board looks to the Procedural Guidelines developed by the Department of Commerce for this GMA provision:[62]

> RCW 36.70A.070(6)(a)(iv)(A) requires an analysis of funding capability to judge needs against probable funding resources…. Counties and cities should forecast projected funding capacities based on *revenues that are reasonably expected* to be available, under existing laws and ordinances, to carry out the plan. If the funding strategies rely on new or previously untapped sources of revenue, the financing plan should include a *realistic estimate* of new funding that will be supplied.

According to the Guideline, "analysis of funding capability" means determination of revenues "reasonably expected" based on existing sources and "a realistic estimate" of any

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[60] Capital Facilities Policies CF-5.3, CF-5.5, CF 5.6, CF 5.9. The City argues these sections of its plan were not amended with Ordinance 4258 and so are not subject to challenge in this action. City's Prehearing Brief at 11, citing *Thurston County v. Western Washington Growth Management Hearings Board,* 164 Wn.2d 329, 190 P.3d 38 (2008).

[61] 2004 Comprehensive Plan IX-20 – IX-21.

[62] WAC 365-196-430(2)(k)(iv) (emphasis supplied)

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Olympia, Washington 98504-0953
Phone: 360-586-0260
Fax: 360-664-8975

new funding source. Many jurisdictions, including Kirkland, undoubtedly undertake a much more sophisticated financial forecast and risk assessment in their annual CFP reviews, but the Board does not find that the GMA requires the Comprehensive Plan transportation element to contain ranges, assumptions and variables, and levels of certainty for transportation funding sources.[63]

The Board concludes that Petitioners have not carried their burden in demonstrating failure to comply with RCW 36.70A.070(6)(a)(iv)(A).

Reassessment of Land Use. RCW 36.70A.070(6)(a)(iv)(C) provides that the finance section of the transportation element shall include:

> If probable funding falls short of meeting identified needs, a discussion of how additional funding will be raised, or how land use assumptions will be reassessed to ensure that level of service standards will be met.

Petitioners contend the City's existing comprehensive plan language is insufficient to address the risk of a mega-project which will vest to an intense development allowance that may not be possible to "reassess" should transportation funding fall short.

The City and Touchstone object, saying this issue was decided in the prior FDO, where the Board found that the City's existing Policy CF 5.2 satisfies this GMA requirement.[64] The Board agrees that there is no basis for revisiting this question.

Conclusion – Transportation Financing Plan

For the foregoing reasons, the Board finds and concludes that Petitioners **have not carried their burden** in demonstrating the City's adoption of Ordinance 4258 violated RCW 36.70A.070(6)(a)(iv)(A) or (C). Legal Issue No. 2 **is dismissed.**

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[63] Board members Earling and Pageler have a continuing concern that the GMA does not provide a firmer framework for cities and counties to establish concurrency in funding capital projects.
[64] City's Prehearing Brief, at 13; Touchstone Response, at 45.

Growth Management Hearings Board
319 7th Ave. SE, Suite 103
P.O. Box 40953
Olympia, Washington 98504-0953
Phone: 360-586-0260
Fax: 360-664-8975

D. Legal Issue 3 - Invalidity

The Prehearing Order sets forth Legal Issue 3:

> 3. *Shall Ordinances 4257 and 4258 be invalidated where their continued effectiveness would substantially interfere with the fulfillment of the goals of the GMA and the requirements of SEPA?*

RCW 36.70A.302(1) provides that the Board may issue an order of invalidity, after a finding of noncompliance and remand to the city or county, upon a determination that continued validity of the non-compliant ordinance would substantially interfere with fulfillment of a GMA goal.[65]

The Board has concluded that Petitioners failed to carry their burden in demonstrating that either Ordinance 4257 or 4258 violated SEPA or GMA requirements. There is no basis for invalidating the Ordinances. Legal Issue No. 3 is **dismissed.**

V. ORDER

Based upon review of Ordinances 4257 and 4258, the City's Statement of Actions Taken to Comply, the Petition for Review, the briefs and exhibits submitted by the parties, the GMA, prior Board orders and case law, having considered the arguments of the parties and having deliberated on the matter, the Board ORDERS:

- The City of Kirkland's adoption of Ordinance Nos. 4257 and 4258 **complies** with SEPA and with the goals and requirements of the GMA as set forth in the October 5, 2009 FDO. The Board hereby enters a **Finding of Compliance** in *Davidson Serles I* regarding the City's comprehensive plan and zoning code amendments for Parkplace. *Davidson Serles I v. City of Kirkland,* Case No. 09-3-0007c, is **closed.**

[65] The Court of Appeals has clarified that this same standard must be applied when the basis for non-compliance is a violation of SEPA. *Davidson Serles v. GMHB*, No. 64751-2-I (Dec. 27, 2010).

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319 7th Ave. SE, Suite 103
P.O. Box 40953
Olympia, Washington 98504-0953
Phone: 360-586-0260
Fax: 360-664-8975

- In *Davidson Serles II*, Petitioners have not carried their burden in demonstrating Ordinance Nos. 4257 or 4258 violate SEPA or the GMA. Legal Issues 1, 2, and 3 are **dismissed.** *Davidson Serles II v. City of Kirkland,* Case No. 10-3-0012, is **closed.**

DATED this 2nd day of February, 2011.

_____
Margaret A. Pageler, Board Member

_____
David O. Earling, Board Member

_____
James McNamara, Board Member

Note: This order constitutes a final order as specified by RCW 36.70A.300 unless a party files a motion for reconsideration pursuant to WAC 242-02-832.[66]

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[66] Pursuant to RCW 36.70A.300 this is a final order of the Board.

Reconsideration. Pursuant to WAC 242-02-832, you have ten (10) days from the date of mailing of this Order to file a motion for reconsideration. The original and three copies of a motion for reconsideration, together with any argument in support thereof, should be filed with the Board by mailing, faxing or otherwise delivering the original and three copies of the motion for reconsideration directly to the Board, with a copy served on all other parties of record. Filing means actual receipt of the document at the Board office. RCW 34.05.010(6), WAC 242-02-240, WAC 242-020-330. The filing of a motion for reconsideration is not a prerequisite for filing a petition for judicial review.

Judicial Review. Any party aggrieved by a final decision of the Board may appeal the decision to superior court as provided by RCW 36.70A.300(5). Proceedings for judicial review may be instituted by filing a petition in superior court according to the procedures specified in chapter 34.05 RCW, Part V, Judicial Review and Civil Enforcement. The petition for judicial review of this Order shall be filed with the appropriate court and served on the Board, the Office of the Attorney General, and all parties within thirty days after service of the final order, as provided in RCW 34.05.542. Service on the Board may be accomplished in person or by mail, but service on the Board means actual receipt of the document at the Board office within thirty days after service of the final order. A petition for judicial review may not be served on the Board by fax or by electronic mail.

Service. This Order was served on you the day it was deposited in the United States mail. RCW 34.05.010(19)

Growth Management Hearings Board
319 7th Ave. SE, Suite 103
P.O. Box 40953
Olympia, Washington 98504-0953
Phone: 360-586-0260
Fax: 360-664-8975